United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

74-2301

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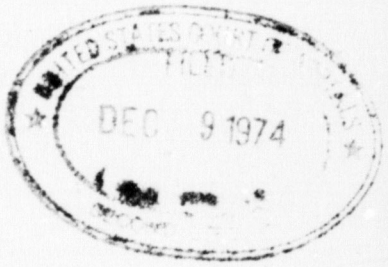
ANTONIO C. MARTINEZ

TO BE ARGUED BY:

APPEAL NO. 74-2301

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT



TOBY ZAMBRANO

Petitioner - Appellant

V.

IMMIGRATION AND NATURALIZATION SERVICE

(by its District Director at New York, N.Y.)

Respondent - Appellee

APPEAL FROM A JUDGMENT OF THE

UNITED STATES DISTRICT COURT FOR THE

EASTERN DISTRICT OF NEW YORK

(WALTER R. BRUCHHAUSEN)
SENIOR U.S. DISTRICT JUDGE

BRIEF FOR APPELLANT

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December 1974

TABLE OF CONTENTS

Cases cited:

ISSUES PRESENTED FOR REVIEW

1- The complaint presented a substantial question requiring the convening of a statutory three-judge court for the purpose of deciding the constitutionality of Sec. 203 (a) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1153 (a).

2- The District Court acted ultra vires in concluding that Section 203 (a) is valid and constitutional. Such conclusion can be reached only by a three-Judge statutory court, 28 U.S.C. Sec. 2282 and 2284.

3- Section 203 (a) invidiously discriminates against American citizens born in the Western Hemisphere and in favor of American citizens born in the Eastern Hemisphere in that if denies to the former that which it grants to the latter, contrary to the Equal Protection of the Laws clause of the Fourteenth Amendment to the Constitution of the United States.

4- A three-judge statutory court may properly set a limit on the power of Congress to create the said invidious discrimination.

STATEMENT OF FACTS

Toby Zambrano appellant here and plaintiff below ("Zambrano") was born in Ecuador and was subsequently granted U.S. citizenship. In January, 1973, Zambrano filed with the appellee District Director of the Immigration and Naturalization Service, a Form I-130 petition to classify his brother Segundo Maximo Zambrano as his "immediate relative" for the purpose of the issuance of an immigrant visa. The District Director denied the petition on the basis that Zambrano's brother, also born in Ecuador, was not eligible for any preference classification under Section 203 (a)(5) of the Immigration and Nationality Act of 1952, 8 U.S.C. Sec. 1153(a)(5), R.3a. Zambrano appealed to the Board of Immigration Appeals to review and reverse the decision of the District Director dated 5/18/73. The Board dismissed the appeal, stating that it was not empowered to pass upon the constitutionality of the laws it administered, R.4a. Zambrano then brought an action in the United States District Court for the Eastern District of New York, R.1a, and moved to impanel a three-judge Court pursuant to 28 U.S.C. Sections 2282 and 2284, R.7a. The District Court Judge denied Zambrano's motion and declared that Sec. 203 (a) of the Immigration

and Nationality Act was constitutional, R.8a. It also granted the District Director's motion to dismiss the action, R.6a. This appeal followed, R.12a.

ARGUMENT

POINT I. The District Court improperly denied Zambrano's motion to convene a three-judge Court.

Zambrano contends that the District Court acted improperly in ruling that Sec. 203 (a) was constitutional without convening at three-judge Court. It is retrodding well-plowed ground to state that an issue must be substantial before the expense of convening a three-judge Court should be incurred. And the Supreme Court has instructed that the lack of substantiality may appear "either because it (the issue raised) is obviously without merit or because its unsoundness so clearly results from the previous decision of this Court so as to foreclose the subject." Bynum v. Connecticut Commission on Forfeited Rights, et al 410 U.S. 173.

The District Court apparently coupled its interest in judicial economy with its consideration as to the gravity of the Federal question presented by the plaintiff appellant.

The District Court stated: "At the outset the Court concludes plaintiff has not presented a substantial question for the convening of a three-judge Court. The Court is not unmindful of its responsibility to carefully scrutinize a request to convene a three-judge Court in the interests of judicial economy", R.9a. While one cannot deny that the three-judge Courts constitute a time-work drain on the Federal Judicial system, no plaintiff who has met the standards required for convening of such a court should be denied one.

When a plaintiff asks for the appointment of a three-judge court, it is the duty of the District Court to ascertain whether a substantial federal question was presented. The District Court stated that the question raised by the plaintiff was not substantial but it did not indicate whether it found that the issue presented to the Court was insubstantial by virtue of being obviously without merit or whether it lacked substantiality because its unsoundness so clearly resulted from the previous decisions of the U.S. Supreme Court so as to foreclose the subject.

POINT II. The issues presented below were not without merit.

For at least two reasons Zambrano cannot assume that the District Court thought that the issues presented to the Court

were without merit. First, Zambrano in his memorandum of law submitted to the District Court, asked whether the District Court should determine if an exercise by Congress of one of its enumerated powers is valid if such exercise clashed with any rights guaranteed to United States citizens under the U.S. Constitution. In this controversy the power of Congress to make laws concerning the entry of aliens into the U.S.A. clashed with the United States Constitutional guarantee to U.S. Citizens of "equal protection under the law".

The Senate Report (Judiciary Committee) #748, states in part as follows:

"Purpose of the Bill. The principal purpose of the bill as amended is to repeal the national origins quota provisions of the Immigration and Nationality Act and to substitute a new system for the selection of immigrants to the U.S."

Zambrano had asked the Court to consider what legitimate governmental interest was protected by the classification system as established under Sec. 203 (a) of the Immigration and Nationality Act and to weigh the same governmental interest against the fundamental personal rights of Zambrano, that the said classification system endangered. In resolving the problem of how to limit qualitatively the number of

immigrants into the U.S., Congress incorporated into the Immigration and Nationality Act a system of selecting from the entire population of potential immigrant visa applicants those people who have either close family ties with U.S. citizens and legal permanent residents or those whose talents can directly contribute to the welfare of the U.S. The selection is based mainly on the view that social cohesion is dependent on the complex web of emotional mutualities which bind members of the same family together with all the mutually supportive connotations--affectionated, moral, and financial--that "family" implies. Given this rationale the incorporation of a system of permitting United States citizens with Eastern Hemisphere born brothers and sisters to have the companionship of their foreign brothers and sisters and of denying the same right to U.S. citizens with Western Hemisphere born brothers and sisters, is blatant and invidious discrimination. Since one's brothers and sisters are generally natives of the same country as one's country of origin, the discrimination becomes one invidiously based on one's national origin.

Moreover, to further point out the merits of the issue, Zambrano called the Court's attention to the able dissent of Justices Marshall and Brennan in Kleindienst v. Mandel 408 U.S. 753, wherein the learned Justices took cognizance

of the difference between cases of bare exclusion of aliens for political advocacy reasons and those in which rights of U.S. citizens are involved. This is not a case of bare exclusion. This is a case concerning Congress' right to exclude aliens versus the right of U.S. citizens to equal protection under the Constitution. Obviously there is merit to the issue as it was set out by Zambrano.

Second, conceding the fact that there was merit to the Zambrano's request to the District Court that it convene a three-judge Court to determine the constitutionality of Congressional legislation that abrogated rights guaranteed to U.S. citizens by the U.S. Constitution, one must then assume that the District Court throught that the Zambrano's position was unsound as a result of previous decisions handed down by the Supreme Court. Apparently in this context the District Court cited Kleindienst v. Mandel, supra, Galvan v. Press 347 U.S. 522 and inter alia, Lem Moon Sing v. U.S. 158 U.S. 538. The Court's decision in Lem Moon Sing v. U.S.,supra, was handed down in the era that saw the Supreme Court issue its decision in Plessy v. Ferguson 163 U.S. 537.(1896). Zambrano not being unmindful of the fact that Mr. Justice Harlan wrote a dissenting opinion in the same. Moreover, one must also note that the Chinese

exclusion cases dealt with a racial test for exclusion and the rights of U.S. citizens was in no way involved as it is here. Congress itself has indicated by attempting to abolish the national origins quota that race should not be a factor in U.S. immigration policy.

Justice Frankfurter, in authoring the Supreme Court's decision in Galvan v. Press supra, referred to Harrisiades v. Shaughnessy 342 U.S. 580 (1951) in authoritative terms. In the latter case the Supreme Court observed that any policy towards aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign affairs, the war power and the maintenance of a Republican form of government. Yet the Court then stated at 589, "such matters are so exclusively entrusted to the political branches of government as to be largely immune from Judicial inquiry or interference." (emphasis supplied). But there are limits.

In Kleindienst v. Mandel supra (as the District Court noted) the Supreme Court stated, "we are not inclined in the present context to consider this line of cases." There is clearly therefore, no foreclosure by the Judiciary of its right to pass upon the constitutionality of Congressional legislation in the area of Immigration. We must note again that even

while the Supreme Court was reserving its right to review Congressional legislation in the area of Immigration, and most recently in Kleindienst v. Mandel, none of the cases cited by the District Court, in any way involved either (1) a U.S. citizen's right to equal protection of the law, or (2) the type of familial relationship involved here but rather cases involving membership in political parties. Clearly then, in view of the foregoing, the District Court could not possibly find that Zambrano's position lacked substantiality as a result of previous U.S. Supreme Court decisions.

Moreover, the District Court cited Kleindienst v. Mandel supra, Galvan v. Press supra, among others, and then asserted that it had to conclude that the Act under attack was valid and constitutional. Because the Supreme Court has in the past held that certain Acts of Congress in the area of Immigration were constitutional, and because the Court has been reluctant to inquire into Congressional action in this area, it does not follow a fortiori, as the District Court's decision suggests, that the Act in question is valid and constitutional. Each Act of Congress must stand or fall on its own merits. The constitutionality of the Act in question is not a subject for international diplomacy. Nor does it

involve membership in a political party a national security issue, nor does it concern the war power.

Zambrano does not seek to deprive Congress of any power granted exclusively to it under the Constitution. Zambrano only seeks to have the Court stop Congress from depriving him of the express Constitutional guarantee of Equal Protection under the Law.

In passing, Zambrano must note that the District Court cited Faustino v. INS, 302 F. Supp. 212, aff'd 432 F. 2d 429, as authority for the insubstantiality of the Zambrano's position and ipso facto for the constitutionality of the act in question. Zambrano does not know what weight the District Court applied to Faustino v. INS supra, but the Supreme Court has stated that the decisions relied on to establish the insubstantiality of the issues presented, must be decisions of the U.S. Supreme Court.

Point III. The Constitution limits the power of Congress to discriminate between U.S. citizens on account of national origin.

The power of Congress to discriminate is limited by the Due Process clause of the Fifth Amendment which includes the principle of Equal Protection when a federal statute discriminates in an invidious manner or deprives persons of their fundamental constitutional rights (italics supplied). Richardson v. Belcher

404 U.S. 78, Bolling v. Sharpe 347 U.S. 497. Here Congress in discriminating, has deprived the U.S. citizen of his constitutional right to equal protection under the law.

In Weber v. Aetna Casualty and Surety Co. 406 U.S. 164, at 173, the Court stated that the essential inquiry in all equal protection cases was inevitably a dual one. "What legitimate state interests does the classification promote? What fundamental personal rights might the classification endanger?" The Court must question not the importance of what interest, but how the challenged statute will promote it. Justice Rehnquist in his dissent in Weber supra states, "Surely there could be no better nor more succinct guide to sound legislation than that suggested by these two questions. The purpose of the statute in question was to establish a new system of preferential admissions based upon the existence of a close family relationship with U.S. citizens or permanent resident aliens and upon the advantage to the U.S. of the special talents and skills of the intending immigrant. The presumption of constitutional validity must disappear when the government enacts legislation the purpose of which is to create classes based upon criteria that in a constitutional sense are inherently suspect. Prime examples of such suspect classifications are those based on race, national origin, alienage,

indigency or illegitimacy. Zambrano is barred by Sec. 203 (a) from bringing his brother into the U.S. Since brother and sisters are almost invariably born in the same country, one cannot but conclude that the U.S. citizen was denied the right of equal protection under the law, that is, the right to petition for his brother because of the Plaintiff-appellant's national origin.

The impact of Section 203 (a) on interests protected by the Fifth Amendment is not outweighed by any compensating protection it may be said to give against the erosion of any interest within the sphere of governmental concern. The constitutional guarantee of equal protection under the law, violation of which is forbidden as part of domestic law must not be determined to be valid when used to classify aliens and exclude them absolutely or conditionally. If the ultimate evil to be guarded against is the admission of too many immigrants to the U.S.A., Congress can establish equal numerical limitations for each hemisphere (without violating the equal protection constitutional guarantee) by applying the classification system to both hemispheres.

CONCLUSION

For the reasons set forth above appellant respectfully

prays that the Order of the U.S. District Court for the Eastern District of New York denying Zambrano's motion to convene a three-judge District Court and granting appellee's motion to dismiss the action be reversed.

Respectfully submitted,

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New York, N.Y.
December , 1974.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

Amendment XIV to the Constitution of the United States:

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Amendment V to the Constitution of the United States:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval aforces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

28 U.S.C. Sec. 2282.- Injunction against enforcement of Federal statute; three-judge court required.

An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnances to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c.646, 62 Stat.968.

28 U.S.C. Sec. 2284.- Three-judge district court; composition; procedure.

In any action or proceeding required by Act of Congress to be heard and determined by a district court of three judges the composition and procedure of the court, except as otherwise provided by law, shall be as follows:

(1) The district judge to whom the application for injunction or other relief is presented shall constitute one member of such court. On the filing of the application, he shall immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. Such judges shall serve as members of the court to hear and determine the action or proceeding.

(2) If the action involves the enforcement, operation or execution of State statutes or State administrative orders, at least five days notice of the hearing shall be given to the governor and attorney general of the State.

If the action involves the enforcement, operation or execution of an Act of Congress or an order of any department or agency of the United States, at least five days' notice of the hearing shall be given to the Attorney General of the United States, to the United States attorney for the district, and to such other persons as may be defendants.

Such notice shall be given by registered mail or by certified mail by the clerk and shall be complete on the mailing thereof.

IMMIGRATION AND NATIONALITY ACT OF 1952, 8 U.S.C. Section 201, 8 U.S.C. Sec. 1151. Numerical limitations on total lawful admission - Quarterly and yearly limitations.

(a) Exclusive of special immigrants defined in section 1101(a) (27) of this title, and of the immediate relatives of United States citizens specified in subsection (b) of this section, the number of aliens who may be issued immigrant visas or who may otherwise acquire the status of an alien lawfully admitted to the United States for permanent residence, or who may, pursuant to section 1153 (a) (7) of this title enter conditionally, (i) shall not in any of the first three quarters of any fiscal year exceed a total of 45,000 and (ii) shall not in any fiscal year exceed a total of 170,000.

Immediate relatives defined

(b) The "immediate relatives" referred to in subsection (a) of this section shall mean the children, spouses, and parents of a citizen of the United States: Provided, That in the case of parents, such citizen must be at least twenty-one years of age. The immediate relatives specified in this

subsection who are otherwise qualified for admission as immigrants shall be admitted as such, without regard to the numerical limitations in this chapter.

Section 203 (a) (5). 8 U.S.C. Sec. 1153 (a) (5). Allocation of immigrant visas - Categories of preference priorities; per centum limitation; conditional entries; waiting lists.

(a) Aliens who are subject to the numerical limitations specified in Section 1151 (a) of this title shall be allotted visas or their conditional entry authorized, as the case may be, as follows:

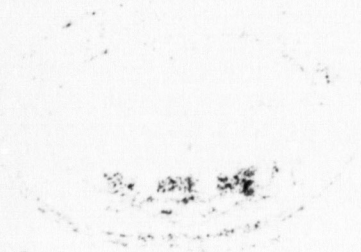
(5) Visas shall next be made available, in a number not to exceed 24 per centum of the number specified in section 1151 (a) (ii) of this title, plus any visas not required for the classes specified in paragraphs (1) through (4) of this subsection, to qualified immigrants who are the brothers or sisters of citizens of the United States.

Section 101, 8 U.S.C. Sec. 1101

(a) As used in this Act -

(27) The term "special immigrant" means -
"(A) an immigrant who was born in any independent foreign country of the Western Hemisphere or in the Canal Zone and the spouse and children of any such immigrant, if accompanying, or following to join him: Provided, That no immigrant visa shall be issued pursuant to this clause until the consular officer is in receipt of a determination made by the Secretary of Labor pursuant to the provisions of section 212(a)(14);

Note 6. Sec. 21(e) of the Act of October 3, 1965 (79 Stat. 921) provides that the number of special immigrants within the meaning of section 101 (a)(27)(A), exclusive of special immigrants who are immediate relatives of United States citizens as described in section 201 (b) of the Act, shall not, in the fiscal year beginning July 1, 1968, or in any fiscal year thereafter, exceed a total of 120,000.



UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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TOBY ZAMBRANO,

Plaintiff-Appellant,

v.

Docket No.
74-2301

SOL MARKS, District Director
Immigration and Naturalization
Service, New York, New York,

Defendant-Appellee

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CERTIFICATE OF SERVICE

ANTONIO C. MARTINEZ, a member of the Bar of this Court hereby certifies that on December 6, 1974 he has served two copies of the brief and one copy of the appendix upon DAVID G. TRAGER, United States Attorney for the Eastern District of New York at 225 Cadman Plaza East, Brooklyn, New York 11201 by mailing same.

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December 6, 1974.